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The Use of Structural Presumptions in Antitrust – Note by Mexico

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1. Introduction

1. Structural presumptions, based on indicators such as market concentration or high market share, allow competition authorities to anticipate possible anticompetitive effects without requiring a thorough investigation in each case. By establishing structural thresholds, through Herfindahl-Hirschman Index (HHI) calculation or market share analysis, authorities could identify situations likely to result in reduced competition. This allows for the more efficient implementation of preventive or corrective measures.

2. At the same time, structural presumptions help standardize competition law enforcement, making the process more predictable and reducing the burden of proof for authorities in certain cases. It also allows to allocate resources to cases requiring more staff members involvement.

3. According to the Federal Economic Competition Law (LFCE for its initials in Spanish), structural indicators, such as market shares and the use of concentration indicators, are used by the Mexican Federal Economic Competition Commission (Cofece) when assessing **mergers, market power and effective competition**.

4. While the LFCE establishes the use of indicators such as market shares and market concentration, it does not set explicitly specific thresholds to be considered as presumptions for concluding competition issues. These indicators are analyzed in conjunction with other qualitative elements to determine a potential competition concern. The following specifies these elements according to the type of procedure.

2. Structural presumptions in merger control

5. A structural presumption can be understood as that in which the authority presumes that a merger has anticompetitive effects when the companies involved exceed certain thresholds of size or market share. In this case, companies involved may demonstrate efficiency gains so that the transaction is authorized.

6. In Mexico, Cofece has not formally issued or ruled affirmatively with respect to any such structural presumption. However, the LFCE provides elements to assess if a merger could substantially lessen competition in a relevant market. The LFCE provides that, to determine whether a merger should be authorized or sanctioned, Cofece must: a) assess the relevant market, b) identify the main economic agents that supply the market, **analyze their market power and the degree of market concentration**; c) assess the effects of the merger on the relevant market and related markets; d) assess the elements provided by the economic agents to prove efficiencies that would be achieved from the merger, and e) other criteria and analytical tools established in the Regulatory Provisions and technical criteria.

7. Regarding to other analytic tools, Cofece issued the "Technical Criteria for the Calculation and Application of a Quantitative Index to Measure Market Concentration"[1]

[1] Cofece (2015), *Criterios Técnicos para el Cálculo y Aplicación de un Índice Cuantitativo para medir la Concentración del Mercado*, (Technical Criteria for the Calculation and Application of a Quantitative Index to Measure Market Concentration). Available in Spanish at:

(Technical Criteria) that defines that market concentration shall be estimated by calculating the Herfindahl-Hirschman Index (HHI).

8. Cofece considers, as a first approximation to the analysis of merger effects , that it would be unlikely that a merger hinders, harms, or impedes competition in the relevant market when: a) the HHI's variation after the merger is less than 100 points; b) the HHI after the merger is less than 2,000 points; c) the HHI after the merger is between 2,000 and 2,500 points, the HHI's variation is between 100 and 150 points, and the resulting economic agent after the merger is not among the four economic agents with the largest market share. Therefore, it can be considered that the HHI criteria are used to presuppose whether a more in-depth analysis of the effects of a merger is required.

9. However, the Technical Criteria explicitly recognize that the HHI is an auxiliary tool for a preliminary approximation of market structure, and that the Commission will not consider HHI in isolation, but rather as part of a more complete analysis of merger effects.

10. Two recent examples can be mentioned in which Cofece considered structural elements, based on the estimation of market shares and the HHI, to block two mergers. These structural elements carried greater weight in the analysis as the markets in question were not characterized by high dynamism or innovation.

2.1. Merger in the dolphinarium entertainment services market (CNT-107-2022)

11. In October 2023, Cofece blocked a merger in the market for dolphinarium entertainment services in Cozumel and Cancún. In these geographic markets there were only three competitors operating, and the merger involved two of them. In Cancun, the operation would result in a merged entity with nearly 50% of the market, and a post-merger HHI over 5,000 points. In Cozumel, the only competitor would be absorbed, and the buyers would become a monopoly in this relevant market. The parties' defense was to expand the relevant market; however, they were unable to prove robustly the users' substitution options.

12. Additionally, the market exhibited high entry barriers because of regulatory restrictions, including requirements for opening dolphinariums and acquiring dolphins. As a result, no new competitors were identified, nor were there indications that the market could grow in a way that would incentivize new entrants.

2.2. Merger in passenger transport by ferry (CNT-018-2023)

13. In August 2024, Cofece blocked a merger in the ferry transportation market in the routes connecting Cancun with Isla Mujeres and Playa del Carmen with Cozumel. Like the previous case, in these markets there were only three competitors operating, and the merger involved two of them. In the route Cancun Hotel Zone-Isla Mujeres, the merger would have caused a monopoly, which would allow it to raise prices or reduce the quality of its services without consumers having any other alternative. In the route Playa del Carmen-Cozumel, the transaction would have resulted in a duopoly structure, with a merged entity with over 50% of the market, and a post-merger HHI over 5,000 points.

14. Because of its structural characteristics, few competitors having access to docks and taking economies of scale, Cofece previously had investigated this market for

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https://www.cofece.mx/wp-content/uploads/2017/11/criterios_tecnicos_para_medir_concentracin_del_mercado.pdf anticompetitive conducts and had carried out an analysis of effective competition. The lack of effective competition resulted in price regulation.

15. In this merger, the parties argued that due to price regulation, there could be no market power. However, Cofece identified that the type of regulation imposed (rate of return) did not limit an increase in prices, since the parties only had to notify the sector authority of the maximum price they would charge during the year; without the regulatory authority reviewing the costs beyond a mere rate of return.

3. Structural presumptions identifying dominance or market power

16. Cofece's Investigative Authority carries out procedures that require an analysis of market power, conditions of competition or effective competition. For those analyses, the LFCE establishes the use of structural elements. However, as mentioned before, these indicators are analyzed in conjunction with other qualitative elements.

17. Structural indicators contribute to the Investigative Authority processes as follows:

1. **Unnotified mergers**: when a merger should have been notified according to the thresholds established in the LFCE; Cofece analyzes whether such merger is unlawful. In order to determine this, the Investigative Authority examines if the merger may confer substantial market power on the resulting economic agent or increase such power, thereby hindering, diminishing, or harming competition. In this sense, the analysis of the determination of substantial power must be carried out.
2. **Effective competition**: Cofece conducts research in certain markets to determine whether there are conditions of effective competition, and whether there are barriers to entry. To this end, the structural indicators already mentioned are analyzed to determine if there are structural, behavioral, or legal barriers that are preventing competition or free market access.
3. **Essential facilities**: Cofece has the power to investigate the presence of essential facilities in the markets, and, where appropriate, make recommendations to regulate their access. In this procedure, the Investigative Authority evaluates market structures that would lead to an economic agent to be the sole supplier of the essential facility.

18. The main structural indicators used to determine market power in these procedures are market shares, which estimation could be based on the quantification of sales (measured in terms of revenue and volume), number of customers, production capacity, or other relevant variables. The analysis can be complemented with indicators of market concentration, such as the HHI.

19. In addition, the LFCE establishes that to determine whether one or more economic agents have substantial power, it must be considered if the economic agent under investigation can set prices or restrict supply unilaterally. Some additional indicators commonly used are margins or profitability measures.

20. In a complementary way, LFCE foresees the analysis of barriers to entry and access of competitors to production inputs. Some examples of the barriers analyzed are the financial and administrative costs of entering the market, the need for government authorizations, trademark recognition, among others.

4. Metrics to measure competition and possible harm to competition

21. In sum, the analysis of market power and potential harm to competition requires a balanced approach between quantitative measures and qualitative measures.

22. Quantitative metrics may include:

1. **Market concentration:** it is measured through HHI and market shares. These indicators quantify how concentrated the market is and may help to assess whether a situation may be anticompetitive.
2. **Prices and margins:** assessing how prices or profit margins change after certain transactions can help to determine if there is market power that allows economic agents to raise prices without losing customers.
3. **Costs and efficiencies:** a cost analysis is carried out to determine if certain conducts are efficient or if they are designed to exclude competitors.

23. Qualitative metrics may include:

1. **Barriers to entry:** the difficulty faced by new competitors to enter the market is analyzed, either due to regulatory requirements, high initial costs, economies of scale or access to key inputs.
2. **Bargaining power:** the relative power of buyers and sellers in a market is considered, and how this balance affects competition. This includes analyzing the power that large buyers or sellers have over the structure of the market.
3. **Strategic behavior:** practices such as predatory pricing, exclusivity, or forced loyalty are evaluated, which could limit competition.
4. **Market structure and product characteristics:** It is evaluated how the structure (e.g., whether it is a monopoly or an oligopoly) and product characteristics affect competitive dynamics. It also analyzes whether there is product differentiation that allows companies to exercise market power.
5. **Opinions of the economic agents of the market:** interviews are conducted with competitors, customers and other key players that provide a qualitative perspective on the conditions of competition in the market.

5. Final remarks

24. The development of structural presumptions can bring **great challenges when the definition of the relevant market is complex,** which is usually the case in industries with differentiated products, in geographical markets of large territorial extension, or in industries in multi-sided markets. For example, in markets such as transport, newly liberalized energy markets, dynamic markets with high innovation, digital markets or others, it could be difficult to apply structural resumptions.

25. In general, **plain structural presumptions are not established in the Mexican legal system.** Structural market indicators are analyzed in a complementary way with other competition conditions indicators, such as barriers to entry, strategic behavior of competitors, access to inputs, among others. However, in merger analysis there are HHI measures that allow Cofece to identify simple and complex cases.

26. It is important to consider the accuracy of enforcement decisions. Structural presumptions can be useful as a starting point, but **these should be flexible and allow for**

more in-depth analysis when the particular circumstances of the case require it. While these presumptions save resources and increase uniformity in the enforcement of the law, there also needs to be flexibility to revise these presumptions and avoid errors that could affect the effectiveness of the process.

27. Therefore, while structural presumptions are useful for detecting potential risks, they need to be complemented with more dynamic analyses that consider the changing nature of markets, especially in sectors where innovation plays a key role. This allows for a more nuanced application of competition laws in modern markets.